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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 1010

A. C. FROST & COMPANY,
Petitioner,

vs.

COEUR D'ALENE MINES CORPORATION
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

JAMES A. WAYNE,
Wallace, Idaho;
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Counsel for Respondent.

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A. C. FROST & COMPANY,
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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

OPINIONS OF COURTS BELOW

No written opinion was rendered by the trial court, but findings of fact and conclusions of law were adopted. (R. 205-218.) Judgment was rendered July 6, 1938. (R. 218-219.)

The Supreme Court of the State of Idaho filed its final opinion on February 15, 1940 (R. 227-235), which appears in 98 Pac. (2) 965. It has not yet been officially reported.

JURISDICTION

The petitioner attempts to found the jurisdiction of this court, under the provisions of Section 237 (b) of the Judicial Code as amended, upon two points which, it claims, raise a substantial Federal question.

1. Was the option agreement as modified a violation of the provisions of the Securities Act of 1933?

2. Assuming that the first question is answered in the affirmative, is the contract as modified invalid and unenforceable by either party in the courts of the State of Idaho?

STATEMENT OF THE CASE

This action was commenced by petitioner in an Idaho state court to recover from respondent for breach of contract. This contract was entered into between respondent and petitioner (in the name of W. J. Boland, petitioner's agent, and assigned to petitioner by Boland on the same day, Finding 4, R. 210, 211, 179) on September 10, 1934, and consisted of an option to petitioner to purchase 1,300,000 shares of treasury stock of respondent, being almost all the stock of respondent in its treasury, for 10c a share. Petitioner was required to make specified monthly payments, at which time stock was issued to it to the amount of the payment. This contract is attached to the complaint as Exhibit A. (R. 175-178.)

Subsequently, on April 26, 1935, this contract was modified to reduce and alter the monthly payments which petitioner was required to make. (Finding 5, R. 211.)

This contract was again modified on May 15, 1935 (Finding 6, R. 212), and the terms of this modification are set forth in plaintiff's Exhibit 14. This modification provided for a general sale of the stock, with 10c of the purchase price of each share being credited to petitioner on the option agreement, and the balance of the purchase price was to be placed in respondent's treasury to be used for the designated purposes. This money so placed in respondent's treasury was to be repaid to petitioner out of the earnings of respondent.

This option contract as modified forms the basis of this action.

The stock of respondent was not registered with the SEC, under the provisions of the Securities Act of 1933, or any amendment thereof, (Finding 10, R. 215), a fact that was well

known to both petitioner and respondent from the inception of the contract.

Petitioner received and paid for 165,000 shares of stock under this contract as modified. Petitioner and R. W. Nuzum, an officer of respondent, together sold and disposed of 279,850 shares of stock to others, including large blocks sold to and through brokerage houses. (Plaintiff's Ex. 74, R. 95, defendant's Ex. 94, R. 136; R. 95, 109, 30, 33-37 inc., 67, 68, 69, 74, 76, 86, 115, 116, 122.) From the purchase money received from these sales made by petitioner and Nuzum, 10c a share was turned in to the treasury of respondent and petitioner received a credit for such amounts on its option payments. (R. 27, 28, 31, 33-37 inc.) Part of the balance of the purchase price was paid directly to petitioner. Nuzum received a 25 per cent commission on part, and $16,306.00 was turned over to respondent and credited to a contingency account of petitioner, to be paid to petitioner out of earnings. (R. 27, 28, 31, 33-37 inc., plaintiff's Ex. 74, R. 95.) Sufficient monies were paid by petitioner to respondent and credited to petitioner from the proceeds of sales to others to meet payments under the option agreement as modified, up to and including the payment due October 10, 1935. (Finding 8, R. 213, 214.)

Petitioner abandoned all its rights under the contract as modified in the summer of 1935, and failed thereafter to make any further purchase of stock because of its inability to arrange the financing. (Finding 9, R. 214.) On March 13, 1936, plaintiff notified petitioner of the forfeiture of the contract. (Finding 11, R. 215.)

The trial court denied petitioner any relief on its first cause of action, which was based on the unexecuted portion of the contract, and allowed petitioner to recover on its second cause of action in the sum of $16,306.00, being the amount received by respondent from the purchase price of stock sold by petitioner and Nuzum, over and above 10c a share, and credited by respondent to petitioner in the contingency account.

Both respondent and petitioner appealed.

The State Supreme Court sustained the trial court on the

first cause of action, but reversed it on the second, and denied petitioner any relief whatsoever.

SUMMARY OF ARGUMENT

A, The petition asserts that there was no violation of the Securities Act of 1933 because it comes within the exemptions of that Act. This was decided against petitioner by the state courts as a question of fact, so no Federal question is presented.

(1) The facts disclose that there was a public offering of the stock, so there is no exemption under Sec. 4 of the Act.

(2) Petitioner can claim no exemption from the operation of the Act on the grounds that it is not an issuer, underwriter or dealer.

B. As the contract as modified was made in violation of the Securities Act of 1933, the decision of the state court that it will not recognize or enforce it is a matter of local common law of the state, and raises no Federal question.

(1) This court will not review questions of local common law.

(2) This court will only consider the final opinion filed by the state Supreme Court.

(3) Both petitioner and respondent are in pari delicto.

(4) The questions presented are not of general importance, involving merely the parties, and factual considerations.

ARGUMENT

(Point A)

The petition asserts that there was no violation of the Securities Act of 1933 because it comes within the exceptions of that Act. This was decided against petitioner by the state courts as a question of fact, so no Federal question is presented.

The Supreme Court of Idaho held (98 P. (2) 965) that this contract as modified was a violation of Sec. 5 of the Securities

Act of 1933 (c. 38, Title I, Sec. 5, 48 Stat. 77, 15 U. S. C. A. 77e), and based this conclusion upon the evidence presented in this cause. Consequently, no substantial Federal question is raised, because the construction of the Federal Statute is not involved; it is merely the application of the Statute to the facts in the instant case. This court does not review the finding of facts made in the state court.

Grayson v. Harris, 267 U. S. 352, 69 L. ed. 652 (1924);
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417 (1908);
King v. West Virginia, 216 U. S. 92, 54 L. ed. 396 (1909).

Petitioner asserts that there is no violation of the Act because of two exemptions contained in Section 4 of the Securities Act of 1933 (15 U. S. C. A. 77d).

A. That the Act does not apply to transactions by an issuer not involving a public offering; and

B. That the Act does not apply to transactions by any person other than an issuer, underwriter, or dealer.

(1) The facts disclose that there was a public offering of the stock, so there is no exemption under Sec. 4 of the Securities Act of 1933.

It is conceded that the stock involved in this case is a "security" as defined by c. 38, Title I, Sec. 2 (1), 48 Stat. 74, 15 U. S. C. A. 77b, and also that the securities were sent through the mail and were transferred in interstate commerce. It is further conceded that these securities were not registered with the Securities & Exchange Commission.

Consequently, petitioner is claiming relief from the operation of the Act under an exemption, and thus the burden is on petitioner to prove that it comes within the exemption, and, further, the terms of an exception are strictly construed against a claimant of its benefit.

Spokane & I. E. R. Co. v. United States, 241 U. S. 344, 60 L. ed. 1037 (1915);

Securities & Exchange Commission v. Sunbeam Gold Mines Co., 95 Fed. (2) 699 (1938).

The facts in this case conclusively substantiate the decision of the state court that the contract as modified was not excepted from the Securities Act of 1933 as not involving a public offering. The state court said (98 P. (2) 965, at 967):

> "The proof rather than sustaining the burden of showing that the transaction was exempted affirmatively shows that all the stock offered for sale amounted to public offerings and that interstate means of communication and transportation were used in connection therewith. Certainly the facts disclosed by the option agreement itself and the so-called subsequent modifications by letters, etc., and the many letters passing between Frost & Company and Coeur d'Alene Mines Company, recognizing that Frost & Company was selling the treasury stock to all and sundry, directing delivery of such treasury stock to other stock firms or brokers for sale to or by them flatly refutes such contention as does likewise the case of Securities & Exchange Commission v. Sunbeam Gold Mining Co., 9 Cir., 95 F. (2) 699."

The state trial court of necessity held that there was a public offering because it found that the contract violated the Securities Act of 1933. (Finding 10, R. 215; Conclusion 4, R. 218.)

These conclusions are amply supported by the evidence.

Petitioner in its complaint alleges modification of the original contract by the letter sent by petitioner to respondent, dated May 11, 1935 (plaintiff's Ex. 14, R. 20); the trial court found that this letter and acceptance thereof effected an alteration (Finding 6, R. 212). This modification provides for a general sale of the stock and specifies how the proceeds of the sales are to be applied. It is undisputed that of all the stock sold under the contract as modified, petitioner received and paid for 165,000 shares, and 279,850 shares were sold and delivered to many other persons. (Plaintiff's Ex. 74, R. 95, and defendant's Ex. 94, R. 136.)

This sale and distribution of the stock to others was carried on pursuant to the contract as modified, and was effected by petitioner and R. W. Nuzum, an officer of respondent corporation.

Plaintiff's Exhibits 25 (R. 28), 26 (R. 29), and 27 (R. 30) disclose a sale of 20,000 shares to or by Starmount as early as the end of January, 1935.

In a letter dated February 1, 1935, written by A. C. Frost, President of petitioner (plaintiff's Ex. 33, R. 42), petitioner shows its desire to have the stock listed on an exchange, "but whichever offers the best advantage for trading purposes". This refutes petitioner's contention that it was purchasing the stock for an investment.

Defendant's Ex. 67 (R. 90) contemplates a sale of stock to Gibson & Co., and a sale of 80,000 shares to this concern was made on May 8, 1935 (R. 30, 69, 76, 115, 122). The President of petitioner actually consummated this sale himself (R. 30, 74, 86).

Plaintiff's Ex. 37 (R. 44), a letter from A. C. Frost to R. W. Nuzum, shows that petitioner was anxious for a general sale of the stock, and that it was not buying the stock for investment purposes. (It should be kept in mind that almost all the treasury stock of respondent was covered by the option. (Finding 3, R. 209; R. 110)).

On April 23, 1935, petitioner gave respondent permission to deal with the treasury stock as it saw fit (defendant's Ex. 50, R. 65). However, petitioner always asserted thereafter that it was entitled to the proceeds of the sales of stock (R. 142). And, in fact, from the money received from stock sold generally to the public thereafter, 10c per share was applied on the option payments and the balance of the purchase price either paid to petitioner or applied as directed by the modification of May 11, 1935 (plaintiff's Ex. 14, R. 20).

On May 6, 1935, Frost wrote a letter to Nuzum approving the sale of 10,000 shares of stock. (Defendant's Ex. 66, R. 82.)

In a letter dated May 11, 1935 (defendant's Ex. 55, R. 76), petitioner agrees to give Nuzum a commission on future sales

of stock, and also on sales already made, in accord with a proposition made by petitioner "some months ago".

Plaintiff's Ex. 28 (R. 33) discloses the agreement to sell 20,000 shares to the J. E. Jones Brokerage Corporation. This sale was agreed to by petitioner (R. 33-37, 69, 86, 116). Ten cents a share from the purchase price received from this sale was turned over to respondent and applied on the option payments. The balance of the purchase price was given to petitioner, who paid Nuzum a 25 per cent commission (R. 33-37).

Defendant's Ex. 63 (R. 82) shows that it was contemplated to sell a large block of this stock before it was listed with the Securities & Exchange Commission.

On July 8, 1935, Frost sent to Nuzum a certificate of this stock for 5000 shares, and requested Nuzum to sell it. Also, he stated that he wished to sell 25,000 or 30,000 shares during that week (defendant's Ex. 70, R. 91).

The principal method used by petitioner in meeting the payments required under the option contract as modified was by a general sale of the stock held under the option, and crediting 10c per share out of the purchase price of the stock sold on the payments (R. 27-28).

That petitioner was making and attempting to make sales of this stock appears from the testimony of petitioner's President, who stated that after June 29, 1935, petitioner ceased making further sales (R. 50-51).

Plaintiff's Ex. 74 (R. 95) shows the amount of this stock which was sold generally to the public by petitioner and Nuzum (R. 95, 109).

In addition to these numerous sales of this treasury stock, petitioner was also during this time making sales to the public of stock of respondent which was owned by it, and also a large amount owned by the Bunker Hill Mines Corporation. (R. 67-68.)

Many of the transactions and correspondence hereinbefore referred to were carried on by A. C. Frost, petitioner's President, but they were all for and on the behalf of petitioner itself. (R. 52.)

Thus, it appears affirmatively from the evidence that the contract as modified, itself, provided for a general sale of the stock to the public, and for the distribution of the proceeds of such sales; both parties contemplated throughout that sales to the public would be offered and made from time to time; and, in fact, 279,850 shares were sold and part of the purchase price received from every sale was credited to petitioner on the option payments, and the balance either paid to petitioner directly or paid as commissions, or turned over to respondent under the agreement, and credited to petitioner in the contingency account.

Consequently, not only has petitioner failed to maintain the burden of establishing that it was exempt from the operation of the Securities Act of 1933, because there was no public offering of the stock, but it conclusively appears from the evidence that the contract as modified is in violation of the Act — as was found by both the state trial court and the Supreme Court of Idaho.

The only question involved is an application of the law to the facts of the instant case. Both state courts found from substantial evidence that there was a violation of the Act. Therefore, no substantial Federal question is presented to this court.

(2) Petitioner can claim no exemption from the operation of the Securities Act of 1933 on the grounds that it is not an issuer, underwriter or dealer.

Petitioner also asserts that as it is not an issuer, underwriter or dealer, it is exempt from the operation of the Securities Act of 1933 under the provisions of Section 4 (1) of the Act. (c. 38, Title I, Sec. 4, 48 Stat. 77.) Again, as petitioner is claiming an exemption, the burden is upon it to establish it.

Spokane & I. E. R. Co. v. United States, supra;
Securities & Exchange Commission v. Sunbeam Gold Mines Co., supra.

This exemption applies to transactions by any person not an issuer, underwriter or dealer. There is no question but that respondent is an issuer as defined by Sec. 2 (4) of the Act. So it is a transaction involving an issuer, and the exemption does not apply. It could hardly be asserted that both parties to any transaction must be either an issuer, underwriter or dealer for the Act to apply, for, if such were the case, any issuer, underwriter or dealer could make general public sales of unregistered securities through the mails and in interstate commerce without violating the Act so long as no sales were made to another issuer, underwriter or dealer. Such a construction would render the Act almost completely ineffective. Consequently, it is immaterial whether petitioner is an issuer, underwriter, or dealer, or not. In the case of Securities & Exchange Commission v. Sunbeam Gold Mines Co., supra, it did not appear that any of the persons to whom the defendant offered to sell its stock were issuers, underwriters or dealers; nevertheless, it was there held that the sale was a violation of the Act.

Furthermore, the facts above set forth show that petitioner is either an underwriter or a dealer, as defined by Sec. 2 (11) and (12) of the Act. (15 U. S. C. A. 77b.)

Sec. 2 (11) is as follows:

> "The term 'underwriter' means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer."

There can be no doubt under the evidence as set forth above that petitioner was purchasing the stock under the contract as modified with a view to the general distribution of the securities, and that petitioner had a direct participation in the undertaking which effected a distribution and sale to many persons of 279,850 shares of this stock, in addition to that actually issued to petitioner. Therefore, petitioner is an underwriter under this definition.

Sec. 2 (12) is as follows:

> "The term 'dealer' means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person."

As pointed out above, a general public sale of this stock was provided for by, and actually carried out under, the option contract as modified. Therefore, petitioner was engaged in the business of offering, buying, selling, dealing, and trading in the stock of defendant, and is a dealer under this definition.

(Point B)

As the contract as modified was made in violation of the Securities Act of 1933, the decision of the state court that it will not recognize or enforce it is a matter of local common law of the state and raises no Federal question.

(1) This court will not review questions of local common law.

The petitioner urges that, conceding that the contract as modified is in violation of the Securities Act of 1933, the refusal of the state court to enforce it deprives it of a right, title, privilege or immunity under a Federal Statute.

Respondent submits that the decision of the Supreme Court of the State of Idaho holding that it would not recognize or enforce the contract is a declaration of the local common law of the State of Idaho, and, consequently, no Federal question is presented.

In its opinion the Idaho court did not base its decision upon any provision of the Securities Act of 1933, or any other Federal Statute. It found that the contract as modified violated the Act and that the parties were in pari delicto. Then it was decided that the contract was unenforceable because, under the established common law of the State, a contract made in violation of a Statute, or against public policy, will not be recognized by the court.

Petitioner in its brief (p. 9) contends that the State Supreme Court, in holding that it will not permit recovery under such a contract, is exercising legislative power and adding a section to the Securities Act of 1933. This conception is erroneous. The court holds that if a contract is made in violation of law, and where by statute such violation is made a criminal offense (c. 38, Title I, Sec. 24, 48 Stat. 87, 15 U. S. C. A. 77x), the court will not recognize or enforce such a contract. This is not the enactment of a statute, by the court, but a proper exercise of judicial power. The cases cited in the court's opinion show that this is the well established rule in Idaho.

McFall v. Arkoosh, 37 Ida. 243, 215 Pac. 978 (1923);
Deer Creek H. Dist. v. Doumecq H. Dist., 37 Ida. 601, 218 Pac. 371 (1923);
Libby v. Pelham, 30 Ida. 614, 166 Pac. 575 (1917);
Cf. McConnon v. Holden, 35 Ida. 75, 204 Pac. 656 (1922).

This is also the general rule elsewhere.

Anderson v. Carkins, 135 U. S. 483, 34 L. ed. 272 (1889);
Weil v. Neary, 278 U. S. 160, 73 L. ed. 243 (1928);
Lingle v. Snyder, 160 Fed. 627 (1908);
Brandenburg v. Miley Petroleum Exploration Co., 16 Fed. (2) 933 (1926);
McManus v. Fulton, 85 Mont. 170, 278 Pac. 126, 67 A. L. R. 690 (1929);

Asher v. Johnson, 26 Cal. App. (2) 403, 79 Pac. (2) 457 (1938);
Crawford v. McConnell, 173 Okla. 520, 49 Pac. (2) 551 (1935);
Delgado v. Delgado, 42 N. Mex. 582, 82 Pac. (2) 909 (1938);
Holm v. Bramwell, 20 Cal. App. (2) 332, 67 Pac. (2) 114 (1937);
See also cases cited in the court's opinion, 98 Pac. (2) 965, 969.

It is well settled that this court will not review questions of local common law.

American Railway Express Company v. Kentucky, 273 U. S. 269, 71 L. ed. 639 (1926);
Kryger v. Wilson, 242 U. S. 171, 61 L. ed. 229 (1916);
Fox Film Corp. v. Muller, 296 U. S. 207, 80 L. ed. 158 (1935).

(2) This court will only consider the final opinion filed by the State Supreme Court.

Petitioner in the petition and brief (p. 8) attempts to raise a Federal question from the opinion of the state court before it was modified after the petition for rehearing was filed. But this court will only recognize the final opinion of the State Supreme Court, and will not consider any temporary opinion which is modified or changed before it is filed in its final form.

Grayson v. Harris, supra.

This court will not disregard the explicit holding of the state court as to the basis of its decision.

Guaranty Trust Co. v. Blodgett, 287 U. S. 509, 77 L. ed. 463 (1932).

(3) Both petitioner and respondent are in pari delicto.

There can be no question but that both the parties to the contract were in pari delicto. The mass of correspondence

introduced as exhibits and the testimony of Frost, petitioner's President, shows that petitioner realized from the inception that these securities were subject to registration under the Securities Act of 1933, and that they were not registered.

On April 4, 1935, petitioner's President wrote a letter to Nuzum, proposing that in making the application to list the securities certain information should be withheld. (Defendant's Ex. 48, R. 61; See R. 61-62.) In addition, Frost testified that he wrote the letter permitting respondent to deal with the stock as it saw fit (defendant's Ex. 50, R. 65) to be used in getting the stock registered with the Securities & Exchange Commission, but that he didn't consider it binding on petitioner (R. 87-88).

(4) The questions presented are not of general importance, involving merely the parties, and factual considerations.

Petitioner asserts that this case involves questions of public importance. But the contrary seems apparent. No new questions of law of universal application are presented; it is concerned merely with a particular factual situation calling for conclusions of ultimate fact thereon and the application of law to those facts. A variation in the facts might result in different conclusions. The state court has found that under these particular facts petitioner is not exempt from the operation of the Securities Act of 1933, and then applies the Idaho common law rule that it will not recognize a contract made in violation of law. This case is of interest solely to the parties involved.

CONCLUSION

Both state courts decided that from the evidence the contract as modified violates the Securities Act of 1933. This is amply supported and presents merely a factual situation which will not be reviewed by this court. Under the well established common law of Idaho the state court refused to enforce an illegal contract made in violation of law. So no Federal question is presented. It is respectfully submitted

that the petition for a writ of certiorari should be in all respects denied, with costs.

Respectfully submitted,

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Counsel for Respondent.

APPENDIX

Pertinent provisions of the Securities Act of 1933, c. 38, Title I, 48 Stat. 74, 77, 87 (15 U. S. C. A. 77a et seq.):

Sec. 2 (15 U. S. C. A. 77b):

"When used in this subchapter, unless the context otherwise requires—

(1) The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

* * *

"(4) The term 'issuer' means every person who issues or proposes to issue any security; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted-management, or unit type, the term 'issuer' means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited liability of any or all of its members, or in the case of a trust, committee, or other legal entity, the trustees or members thereof shall not be individually liable as issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term

'issuer' means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or other mineral rights, the term 'issuer' means the owner of any such right or of any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering."

Sec. 4 (15 U. S. C. A. 77d):

"The provisions of section 77e (Sec. 5) shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions within one year after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 77h is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter."

Sec. 5 (U. S. C. A. 77e):

"(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of trans-

portation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security registered under this subchapter, unless such prospectus meets the requirements of section 77j; or

(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 77j."

Sec. 24 (15 U. S. C. A. 77x):

"Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both."

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